MAY 16 1941
CHARLES ELMORE CROP
CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 978.

COMPANIA ESPANOLA DE NAVEGACION MARITIMA S. A. and COMPAGNIE GENERALE DE NAVIGATION A VAPEUR CYPRIAN FABRE,

Petitioners,

—against—

ROBERTO HERNANDEZ, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOSEPH K. INNESS,
Counsel for Respondent.

THE COURT PRESS, N. Y. C.

INDEX.

PAGE

I. The Opinions of the Courts Below..... 1

II. Statement of the Case..... 2

POINT I—The decision of the Circuit Court of Appeals is correct on principle and authority..... 7

(A) United States Maritime Commission had jurisdiction 7

(B) Petitioners properly held jointly and severally liable 9

(C) Circuit Court of Appeals correctly reversed the District Court on the question of mitigation of damages..... 10

POINT II—Rule 52 of the Rules of Civil Procedure is not applicable 13

POINT III—Comment on petitioners' moving papers and brief 15

POINT IV—The application for a writ should be denied 16

TABLE OF CASES CITED:

Compagnie Generale Transatlantique v. *American Tobacco Co.*, 31 Fed. (2d) 663..... 14

Filley v. *Pope*, 115 U. S. 213..... 11

Florida v. *U. S.*, 282 U. S. 194, 215..... 13

Grand Trunk Western R. Co. v. *H. W. Nelson Co.*, 116 Fed. (2d) 823, 834..... 15

Hamilton v. *McPherson*, 28 N. Y. 72..... 11

Lamborn v. *National Bank of Commerce*, 236 U. S. 469 11

PAGE

Manufactures R. Co. v. *U. S.*, 246 U. S. 247..... 13
Meeker v. *Lehigh*, 236 U. S. 412..... 13
Montrose v. *St. Louis*, 25 Fed. (2d) 750, 753, affd. 25 Fed. (2d) 755..... 13

N. Y., N. H. & H. R. Co. v. *Ballon & Wright*, 252 Fed. 862, 865 13
Norrington v. *Wright*, 115 U. S. 188..... 11

Southern Pacific Co. v. *Goldfield Consolidated Milling & Tea Co.*, 220 Fed. 14..... 13
Spiller v. *Atchison T. & S. Co.*, 253 U. S. 117.....13, 14

U. S. Navigation Co. v. *Cunard*, 284 U. S. 474..... 8

TEXT BOOK CITED:

Cooley on Torts, 4th Ed., page 255..... 10

STATUTES:

Rules of Civil Procedure, Rule 52..... 13

Shipping Act, 1916, Sec. 14 (Title 46, U. S. C., Sec. 812, subdivision Fourth) 4, 7, 8

United States Shipping Act, 1916, Title 46, U. S. C., Sec. 829 .....5, 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 978.

COMPANIA ESPANOLA DE NAVEGACION MARITIMA S. A. and COMPAGNIE GENERALE DE NAVIGATION A VAPEUR CYPRIAN FABRE,

Petitioners,

—against—

ROBERTO HERNANDEZ, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The findings of fact and orders of the United States Maritime Commission (R. 81-100) are reported in 1 U. S. M. C. 686 and 2 U. S. M. C. 62.

The opinion of the United States District Court for the Southern District of New York (R. 133-147) is reported in 31 Fed. Sup. 76.

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 159-163) is reported in 116 Fed. (2d) 849.

II.

Statement of the Case.

The testimony before the Maritime Commission was introduced by petitioners as Defendants' Exhibit A in the District Court. By order of the Circuit Court of Appeals printing of this testimony as part of the record in that court was dispensed with, three typewritten copies of said exhibit having been furnished for use by that Court (R. 156). References herein which are not to the printed record are to the various hearings before the Examiner of the United States Maritime Commission and, for convenient reference, are identified by date of hearing and page number.

In June, 1934, respondent and one J. T. de Bareno entered into an oral contract whereby respondent agreed to ship automobiles of General Motors and Chrysler manufacture at a discount and to ship them via the Spanish Conference Line (petitioners herein) to de Bareno in Bilbao, Spain (R. 105; hearing April 6th, 1937, p. 54), that being the only direct route from New York to Bilbao (hearing April 6th, 1937, p. 7). By the terms of the agreement, respondent was required to ship $25,000 worth of such automobiles per month for a period of seven months from June to December, 1934, inclusive, purchases to total $175,000 (hearing April 6th, 1937, pp. 53-55; R. 104, 105). If, in any month or months, $25,000 worth of automobiles were not shipped, they were to be added to the shipments in the succeeding month or months (hearing April 6th, 1937, p. 54). Purchase of the automobiles was to be financed by de Bareno through

letters of credit or by cabling funds when requested (R. 106). All charges in connection with furnishing the automobiles were to be absorbed by de Bareno (hearing September 15th, 1938, p. 345) and respondent was to receive a profit of 15% on the contract sum of $175,000, namely, $26,250 (hearing April 6th, 1937, pp. 53, 65; R. 105, 106). On July 2nd, 1934, de Bareno, in part performance of the contract and his undertaking to finance the purchase, opened an initial letter of credit in favor of respondent in the sum of $14,200, to expire August 2nd, 1934 (R. 107).

Respondent, through its President, and a disinterested and independent freight brokerage firm, made continuous demands upon the petitioners herein, members of the Spanish Conference, for freight space for respondent's automobiles on their then sailing vessels or any succeeding sailings, but petitioners failed and refused to award space to respondent.

Petitioners were advised by respondent of the de Bareno contract, its terms and conditions, and that respondent would not only lose its profit, but might well be sued by de Bareno for failure to fulfill the contract if the petitioners persisted in refusing freight space to it (hearing April 6, 1937, pp. 57-59, 61).

Because of the refusal of the petitioners to award space de Bareno extended the expiration date of the original letter of credit from August 2nd to October 2nd, 1934, pending continued efforts to obtain space. Respondent did ship $8,000 worth of automobiles under the de Bareno contract on petitioners' vessels, which it was able to do only by boxing the same and calling them Reos and Whites rather than General Motors or Chrysler products. However, the remainder of $167,000 worth of cars could not be shipped by

respondent because of the petitioners' unlawful discrimination against it and the contract expired unfulfilled on December 31st, 1934 to that extent. Respondent was thereby damaged in the sum of $25,050, which sum represents the agreed profit of 15% on above mentioned sum.

Following the continued refusals of the petitioners to furnish space and upon expiration of the de Bareno contract, unfulfilled, the respondent wrote to the United States Shipping Board complaining of the discrimination (hearing April 6th, 1937, pp. 90-91; Complainant's Exhibit 8). In reply to this communication, the Shipping Board advised respondent that it could not treat the letter as a formal complaint but that respondent should avail itself of the remedies provided by statute. Thereupon and on or about June 27th, 1935, respondent herein filed a formal complaint with the United States Shipping Board against the members of the North American Spanish Conference, including the petitioners herein, to recover reparation for unlawful discrimination, pursuant to the Shipping Act of 1916, Title 46, U. S. C., Section 812.

Lengthy testimony, consisting of some seven hundred pages, and numerous exhibits, was taken before the Examiners of the United States Maritime Commission, which superseded the Shipping Board. On that record, and following two oral arguments before the Maritime Commission in Washington, D. C., the Commission found: (1) The existence of the contract between respondent and de Bareno, as alleged; (2) the respondent's continuing demand upon the petitioners for freight space; (3) the petitioners' unlawful discrimination against the respondent in violation of the Shipping Act; (4) the petitioners' knowl-

edge of the terms of the de Bareno contract; (5) the number of automobiles required to be shipped by respondent in order to fulfill its contract to ship $167,000 worth of cars; (6) the availability to the respondent of the required number of cars; (7) the availability of space on the petitioners' vessels for the carriage of said required number of automobiles; (8) that through petitioners' unlawful discrimination respondent was damaged in the amount of $25,050; (9) that the petitioners were jointly and severally liable for such damages (R. 81-89, 91-98); and entered its final order requiring the petitioners to pay to the respondent the sum of $25,050, with interest (pp. 99-100).

As the order of the United States Maritime Commission was not complied with, respondent instituted suit in the United States District Court for the Southern District of New York, pursuant to Title 46, U. S. C., Section 829.

On the trial in the District Court the respondent herein offered in evidence the findings and orders of the United States Maritime Commission and rested (R. 19-20). The petitioners introduced the record before the Commission, as Defendants' Exhibit A, and contended that the findings of the Commission were not supported thereby (R. 20).

No testimony was introduced in the District Court by any of the parties on the matters which were before the United States Maritime Commission. The only new matter offered on the District Court trial was testimony on behalf of petitioners in an effort to establish that respondent could and should have mitigated its damages by breaching the de Bareno contract which restricted shipments to Spanish Conference Line vessels (R. 105; hearing April 6th, 1937,

p. 54), that being the only direct route from New York to Bilbao (hearing April 6th, 1937, p. 7), and shipping the automobiles by some vague and undefined transshipment route to continental European and British ports and thence to Bilbao, Spain.

The District Court upheld the jurisdiction of the United States Maritime Commission and affirmed the Commission's findings with respect to the contract, the petitioners' knowledge of the terms thereof, the petitioners' unlawful discrimination and their joint and several liability. However, on no new evidence of any kind, the District Court held that the respondent had not proven its damages with sufficient certainty as to amount and further held that respondent should have mitigated its damages caused by petitioners' unlawful and willful discrimination by breaching the terms of the de Bareno contract, which restricted shipments to petitioners' lines and shipping by the aforesaid vague and undefined route to continental European and British ports and there transshipping to Bilbao, although there was no testimony showing what vessels sailed to Bilbao from such ports or the number of automobiles such vessels, if any, could and would accommodate.

Judgment was entered in the District Court dismissing the complaint, from which an appeal was taken to the United States Circuit Court of Appeals for the Second Circuit.

The matter was fully briefed and argued in the Circuit Court of Appeals, which Court affirmed the Maritime Commission and the District Court as to the existence of the contract, petitioners' knowledge of its terms, the continuous demands on the part of the respondent for freight space, the petitioners' unlawful discrimination against respondent, and the joint and

several liability of the petitioners for the damages suffered. The Circuit Court of Appeals further found that the record before the Maritime Commission contained substantial evidence establishing respondent's damages in the sum of $25,050 and, since there was no additional evidence of any kind introduced before the District Court on that subject, reversed the District Court, with direction to enter judgment enforcing the final order of the Commission.

In addition, the Circuit Court pointed out that petitioners had not sustained their burden of proof that damages could be mitigated and held that the provision of the de Bareno contract restricting the shipments to Spanish Conference Line vessels, the only direct route from New York to Bilbao, was of consequence and a material part of that contract and that the District Court had neither the means nor the right to determine why the parties so contracted and erred as a matter of law in holding that respondent should have ignored this material provision of the contract and shipped the automobiles by a transshipment route, vaguely referred to, and undefined by the petitioners in the testimony before the District Court (R. 162).

POINT I.

The decision of the Circuit Court of Appeals is correct on principle and authority.

(A) The United States Maritime Commission had jurisdiction.

In spite of petitioners' statement to the contrary, the respondent herein was a shipper within the meaning of the Shipping Act, 1916, Section 14 (Title 46,

U. S. C., Sec. 812, subdivision Fourth). The record before the Commission proves that respondent purchased automobiles in its own name, paid for them, engaged freight space for their transportation, shipped them in its own name and paid the freight for such transportation.

When this matter first came before the United States Maritime Commission, the petitioners herein defended on the ground that they could not ship the respondent's automobiles, due regard being had for the proper loading of the vessels and available tonnage. The petitioners themselves urged upon the Commission that much would depend upon the basic cargoes available, such as grain (hearing April 7th, 1937, p. 260), thereby urging that intricate questions of fact, involving technical knowledge, must be determined and given proper effect in the light of the requirements of correct maritime methods relating to the stowage of the particular kind of freight. Petitioners now urge the contrary before this Court.

Although the question of jurisdiction was not raised before the Maritime Commission, but was raised for the first time in the District Court, both the District Court and the Circuit Court of Appeals, with the entire record before them, applied the tests laid down by this Court in *U. S. Navigation Co.* v. *Cunard,* 284 U. S. 474, and properly held that the solution of the question of unjust discrimination depended on technical knowledge in the light of the tonnage and the manner in which the vessels should be loaded, as well as upon involved and intricate factual matters, and thus properly upheld the jurisdiction of the Commission.

(B) The petitioners were properly held jointly and severally liable.

The statement by the petitioners that joint and several liability was based "solely" on the fact that the carriers were associated in a conference is incorrect.

The petitioners were held jointly and severally liable because of the finding by the United States Maritime Commission, by the District Court, and by the Circuit Court of Appeals, that they actively planned together to injure the respondent. The basis of holding the petitioners jointly and severally liable was their concert of action and common intent and purpose in this respect, and was not based on the circumstance that they were associated in a conference under the Shipping Act (R. 96-98).

In addition, the petitioners now attempt to retry the facts, and in particular the force and effect of a certain cable sent to an automobile distributor in Bilbao, Spain, in answer to his complaint regarding respondent's shipments to that port, in which the petitioners stated that they sympathized with the said distributor and emphasized that no automobiles had, as yet, been shipped. It is respectfully submitted that the findings of fact of the Maritime Commission, the District Court and the Circuit Court of Appeals are conclusive and that issue is not properly before this Court.

Petitioners also urge that the question of joint and several liability becomes important because one of the members of the Spanish Conference, originally sued, has been liquidated and contribution from it

cannot be had by the petitioners herein. In Cooley on Torts, 4th Ed., page 255, it is said:

> "In determining whether a participant in a tort shall be held liable as a joint tort-feasor, the court will not give any consideration to the question whether he would have any remedy for contribution against the other, since the court does not concern itself with the respective rights of wrongdoers among themselves * * *."

The finding of joint liability by the Commission, and all of the courts, is based on facts supported by substantial evidence and conforms with the authorities as set forth by the Commission (R. 97, 98).

(C) The Circuit Court of Appeals correctly reversed the District Court on the question of mitigation of damages.

The uncontradicted evidence is that the contract between respondent and de Bareno provided for shipments only on Spanish Conference line vessels. This fact was testified to by both parties to the contract (R. 65, 69, 71, 72, 105; hearing April 6th, 1937, p. 54).

The reason for such condition in the contract is apparent. The Spanish Conference line vessels were the only vessels running directly from New York to Bilbao, Spain. Shipment to continental European and British ports and transshipment from those ports to Bilbao, Spain, assuming there were services which would and could have accommodated respondent's automobiles, would have involved additional hazards which de Bareno was unwilling to accept. Transshipment would be slow, it would necessitate extra handling at transshipment points, it would increase

the risk of damage to unboxed automobiles, it would subject the unboxed automobiles to risk of theft and damage at foreign ports while awaiting arrival of on-carrying vessels, and it would increase the insurance risk and premiums. These are very real objections to transshipment and justify de Bareno's requirement that shipments be made only on petitioners' vessels, the only direct route to Bilbao, if, in fact, justification is necessary.

It is submitted that the parties to the de Bareno contract where within their rights in contracting with respect to the route, that the condition was of consequence and a material part of the contract, and that the District Court had neither the means nor the right to determine why the de Bareno contract contained such condition or warranty, although, in the case at bar, the reason is obvious.

Norrington v. *Wright,* 115 U. S. 188;
Filley v. *Pope,* 115 U. S. 213;
Lamborn v. *National Bank of Commerce,* 236 U. S. 469.

Furthermore the defense of mitigation of damages was not raised before the Maritime Commission, but was raised for the first time in the District Court. The burden of proving this defense was upon the petitioners herein.

Hamilton v. *McPherson,* 28 N. Y. 72.

Testimony introduced by petitioners was of the vaguest sort. There was no proof whatever that lines running out of continental European and British ports to Bilbao could or would have accommodated

the automobiles which respondent was required to ship in order to fulfil the de Bareno contract. It is, therefore, submitted that even if the contract did not provide for shipments on Spanish Conference Line vessels only, the petitioners failed to prove with sufficient certainty that the respondent could have mitigated damages by the means suggested.

In support of their argument on mitigation of damages the petitioners lay great stress on the contract dated March 31st, 1934 entered into between respondent and the members of the Spanish Conference Line. They urge that the provision permitting respondent, without prejudicing its position regarding future shipments, to ship by lines other than the Spanish Conference lines, in the event the latter did not furnish space, required respondent to ignore the terms of the de Bareno contract with respect to shipments only on Spanish Conference line vessels.

Certainly the fact that the contract of March 31st, 1934 permitted respondent to seek space elsewhere in the event the carriers failed to furnish the same, without prejudicing respondent's future rights under the contract, could not affect the respondent's duties and obligations under the de Bareno contract which was entered into in June, 1934. It would scarcely be an answer to de Bareno for respondent to say: "I know your contract with me restricts shipments to Spanish Conference line vessels only, but you must take shipments by any means I see fit because I have a contract with the Spanish Conference which permits me to ship on other lines if they refuse me space."

Respondent's contract with the Spanish Conference could have no possible bearing on the materiality of the provisions in the de Bareno contract.

The portion of the March 31, 1934 contract which should have been emphasized by the District Court is Paragraph 1 wherein the respondent herein agreed to ship only on Spanish Conference line vessels and the petitioners herein agreed to carry all such shipments for respondent (R. 113); which they failed and unlawfully refused to do.

POINT II.

Rule 52 of the Rules of Civil Procedure is not applicable.

The application of Rule 52 of the Rules of Civil Procedure was urged by petitioners before the Circuit Court of Appeals without effect. The trial originated before the United States Maritime Commission. The Commission is the fact-finding body.

> *Florida* v. *U. S.*, 282 U. S. 194, 215;
> *Manufactures R. Co.* v. *U. S.*, 246 U. S. 247;
> *Meeker* v. *Lehigh*, 236 U. S. 412;
> *Spiller* v. *Atchison T. & S. Co.*, 253 U. S. 117;
> *Southern Pacific Co.* v. *Goldfield Consolidated Milling & Tea Co.*, 220 Fed. 14;
> *Montrose* v. *St. Louis*, 25 Fed. (2d) 750, 753, affd. 25 Fed. (2d) 755;
> *N. Y., N. H. & H. R. Co.* v. *Ballon & Wright*, 252 Fed. 862, 865.

It alone had the opportunity to judge the credibility of the witnesses before it, none of whom appeared before the District Court with the exception of Mr. Hernandez. The qualifications of expert wit-

nesses and their credibility were for the Maritime Commission to decide.

> *Spiller* v. *Atchison T. & S. Co.*, 253 U. S. 117, 130.

The contract with de Bareno, its terms and conditions, the demands for freight space, petitioners' unlawful discrimination, petitioners' knowledge of the terms of the de Bareno contract, the number of automobiles required to be shipped, the availability of the required number of automobiles, the financial ability of respondent to perform the contract, and the damages suffered by respondent were issues tried before the Maritime Commission, which made its findings supported by substantial evidence and, in most instances, on uncontradicted evidence.

No evidence on these questions was introduced in the District Court. The new matter introduced by petitioners in the District Court was confined to the question of mitigation of damages, which has been dealt with previously.

The United States Shipping Act, 1916, Title 46, U. S. C. Section 829, provides:

> "In the District Court the findings and order of the Board shall be prima facie evidence of the facts therein stated * * *."

On no new evidence before the District Court it was its duty to affirm the findings of the Commission if supported by substantial evidence.

> *Compagnie Generale Transatlantique* v. *American Tobacco Co.*, 31 Fed. (2d) 663.

The District Court erred in substituting its views of the testimony for those of the United States Maritime Commission and the Circuit Court of Appeals correctly rectified that error.

POINT III.

Comment on petitioners' moving papers and brief.

The petition and brief proceed on the theory that this Court will review the facts.

Their constant quoting of the word "contract" and the words "oral contract" is for the purpose of casting doubt upon its existence. Petitioners lose sight of the fact that the contract was found, by the United States Maritime Commission, the District Court and the Circuit Court of Appeals, to have in fact existed.

A written contract is of no higher dignity than an oral one except under the Statute of Frauds, which statute is not here involved.

> *Grand Trunk Western R. Co.* v. *H. W. Nelson Co.,* 116 Fed. (2d) 823, 834.

Similarly, petitioners' constant characterization of the contract as a "commission contract" has no proper place in their application before this court, as the finding of all three trial bodies was to the contrary.

Nor has the force and effect of petitioners' joint cable sent to a distributor in Spain, in response to his objections to respondent's shipments of automobiles to Bilbao, any proper place in this application for a writ. The effect of that cable, coupled with other testimony, was found by all three trial bodies and is not here subject to review.

Throughout their moving papers, petitioners refer to "additional evidence" before the District Court in an effort to convey the impression that the questions before the Maritime Commission were the subject of additional proof in the District Court. This is not the fact. The new evidence before the District Court was confined to the question of possible mitigation of damages, which question was raised for the first time in that Court.

Petitioners' repeated assertion that joint and several liability was imposed merely because of association of the carriers in an approved conference agreement is erroneous. The basis of joint liability was the concert of action and common intent and purpose of the petitioner to injure the respondent in its business. The conference agreement was merely a circumstance which doubtless facilitated the concert of action on the part of the petitioners.

POINT IV.

The application should be denied.

This case does not involve a question of public concern, nor is it one of general importance, nor is there any contention that uniformity of decisions is involved.

The decision of the Circuit Court of Appeals is in accord with the law.

It is, therefore, respectfully submitted that the petition for certiorari should be denied.

New York City, May 14, 1941.

JOSEPH K. INNESS,
Counsel for Respondent.